

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Draper, *et al.*

Examiner: HOFFMAN, Mary C.

Application No.: 10/675,855

Art Unit: 3733

Filed: September 25, 2003

Confirmation No.: 3955

Title: **DEVICE, SYSTEMS AND METHODS FOR RETRACTING, LIFTING, COMPRESSING, SUPPORTING OR REPOSITIONING TISSUES OR ANATOMICAL STRUCTURES**

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Commissioner for Patents

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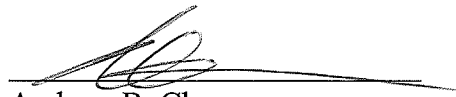
PETITION FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER
37 CFR § 1.705(b)

The undersigned hereby petitions under 37 CFR § 1.705(b) to request reconsideration of the patent term adjustment included with the Notice of Allowance mailed on December 2, 2009. In accordance with 37 CFR § 1.705(b), this petition is being filed after the mailing of the Notice of Allowance but prior to payment of the issue fee. Applicants further submit for consideration, a statement of the facts involved as required under 37 CFR § 1.705(b)(2).

The Commissioner is authorized to charge \$200 to Deposit Account No. 194293 for the petition fee as set forth in 37 CFR § 1.18(e). Should this fee be in error, the Commissioner is hereby authorized to debit or credit Deposit Account No. 194293, Deposit Account Name STEPTOE & JOHNSON LLP.

Respectfully submitted,

Date: 1/14/10
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Andrew B. Chen
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STATEMENT IN SUPPORT OF PETITION FOR RECONSIDERATION OF PATENT

TERM ADJUSTMENT UNDER 37 CFR § 1.705(b)

The undersigned respectfully requests the reconsideration of the patent term adjustment ("PTA") for U.S. Patent Application 10/675,855 ("the '855 patent").

The PTA to date '855 application is 520 provided that the issue fee is paid on March 2, 2010 and the patent issues on Tuesday, June 15, 2010 (i.e., the Tuesday that is 28 weeks after the mailing date (December 2, 2009) of the Notice of the Patent Term Adjustment). The current PTA calculation of 520 days is based on 796 days of USPTO delay and 276 days of Applicant delay. See PTA calculation downloaded from PAIR, attached as Exhibit A.

Based on the recent decision in Wyeth v. Dudas, 580 F.Supp.2d 138 (D.D.C. 2008), aff'd, Wyeth v. Kappos, No. 2009-1120 (Fed. Cir. January 7, 2010) (both decisions attached as Exhibit B), Applicants believe that they are entitled to an additional portion of patent term for a total of **1,726 days**.

In Wyeth v. Kappos, the Federal Circuit interpreted 35 U.S.C. § 154, which governs PTA and the limitations on PTA. According to 35 U.S.C. § 154, there are different periods of delay during the prosecution of an application in which a patentee may secure additional patent term. One particular class of delays ("A delays") provide a day-for-day extension of patent term for PTO failures to comply with statutory deadlines such as issuing a first office action within

fourteen months of the application filing date; responding to a reply within four months; issuing a patent within four months of a payment of an issue fee; or the like. See, 35 U.S.C. § 154 (b)(1)(A)(i) and Wyeth v. Kappos, slip op. at 3. Another class of delay (“B delay”) provides that a patent application shall not have a pendency longer than three years from the filing date of the application. Id. That is, the patent term is extended one day for each day after three years of the filing date. However, A delays and B delays are subject to limitations so that there is no double-counting of delays when A delays overlap B delays. See, 35 U.S.C. § 154(b)(2)(A) and Wyeth v. Kappos, slip op. at 3.

In Wyeth v. Kappos, the issue was how the “overlap” of delays was interpreted. According to the PTO’s interpretation of 35 U.S.C. § 154(b)(2)(A), A delays and B delays ran concurrently (i.e., overlap) from the filing date; thus, the PTO chose the greater of the A delay or B delay to be the adjustment for patent term. In contrast, Wyeth argued that A delays and B delays only overlap after three years from the filing date. Accordingly, Wyeth argued that it was entitled to any A delays prior to three years from the filing date as well as any B delays after the three years from the filing date.

The Federal Circuit found that the PTO’s interpretation of the overlap of delays was contrary to plain language of 35 U.S.C. § 154, and the court gave “no deference to the PTO’s greater-of-A-or-B rubric” in determining patent term adjustment. Wyeth v. Kappos, slip op. at 13. Rather, the Federal Circuit found that there can be no “A delay” overlap with “B delay” prior to the three-year mark because B delay only starts after three-year mark and not at the time of filing. Id. at 8. Based on the decision in Wyeth v. Kappos, a patent holder is entitled to patent term adjustment that includes “A delay” and “B delay” minus any overlap between “A delay” and “B delay” and minus any Applicant delays.

In accordance with Wyeth v. Kappos, the undersigned provides the following calculation in support of Applicants’ petition for PTA:

“A delay”:

643 days (November 25, 2004 (14 month date) to August 30, 2006 (mailing date of Restriction requirement)

53 days (PTO delay in mailing Final Rejection of July 8, 2008)

67 days (PTO delay in mailing Non-Final Rejection of June 15, 2009)

33 days (PTO delay in mailing Notice of Allowance of December 2, 2009)

796 days of “A delay”

“B delay”:

September 25, 2006 (3 years after patent application was filed) to June 15, 2010
(anticipated issue date) = **1,359 days**

“Overlap of A delays occurring during B delay”:

53 days (PTO delay in mailing Final Rejection of July 8, 2008)
67 days (PTO delay in mailing Non-Final Rejection of June 15, 2009)
33 days (PTO delay in mailing Notice of Allowance of December 2, 2009)
153 days of “Overlap”

Applicants’ Delays

31 days (Response to Non-final Rejection of June 14, 2007)
99 days (Supplemental Response of April 25, 2008)
61 days (RCE in response to Final Office action of July 9, 2008)
85 days (Supplemental Response of March 4, 2009)
276 days of Applicants’ delay.

Total PTA

Total PTA of **1,726 days** is the result of (A delay) + (B delay) – (Overlap of any A delay during B delay) – (Applicants’ delay), i.e., 796 days + 1359 days – 153 days – 276 days.

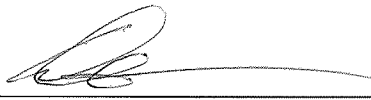
In accordance with 37 C.F.R. § 1.705(b)(iii), Applicants further submit that the ‘855 application is not subject to any terminal disclaimer. Applicants also submit that there were no circumstances constituting a failure to engage in reasonable efforts to conclude processing of examination of the ‘855 application as set forth in 37 CFR § 1.704.

For the reasons stated above, reconsideration of PTA is respectfully requested. Should any further fees be required, the Commissioner is hereby authorized to debit or credit Deposit Account No. 194293, Deposit Account Name STEPTOE & JOHNSON LLP.

Respectfully submitted,

Date: 1/14/10

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